May 21, 2018

The Honorable Pete Sessions
Chairman
The Committee on Rules
U.S. House of Representatives
H-312 The Capitol
Washington, DC 20515

The Honorable Jim McGovern
Ranking Member
The Committee on Rules
U.S. House of Representatives
H-312 The Capitol
Washington, DC 20515

The Honorable Mac Thornberry
Chairman
Armed Services Committee
U.S. House of Representatives
2216 Rayburn House Office Building
Washington, DC 20515

The Honorable Adam Smith
Ranking Member
Armed Services Committee
U.S. House of Representatives
2216 Rayburn House Office Building
Washington, DC 20515

Re: Amendments to the National Defense Authorization Act for Fiscal Year 2019, H.R. 5515

Dear Chairmen Sessions and Thornberry and Ranking Members McGovern and Smith:

On behalf of the members of the Acquisition Reform Working Group,[1] we are writing to share our positions on amendments being offered to the National Defense Authorization Act (NDAA) for Fiscal Year 2019, H.R. 5515. The amendments highlighted below will have an impact on the ability to provide goods and services to the Department of Defense and government-wide across a variety of industries. To ensure the national security of the United States is moving forward and for continuation of the steps taken to reform the acquisition process, we hope you will consider our position on the following amendments.

Specifically, we support the inclusion of the following provisions:

Amendment 1, Rep. Young (AK): This amendment would expedite compliance the legal mandate that agencies provide reciprocity to other agencies if a security clearance is issued by an

[1] The Acquisition Reform Working Group (ARWG) is comprised of the Aerospace Industries Association, American Council of Engineering Companies, Financial Executives International, Information Technology Alliance for the Public Sector, National Defense Industrial Association, Professional Services Council, The Associated General Contractors of America, The Coalition for Government Procurement, and the U.S. Chamber of Commerce. We represent thousands of small, mid-sized, and large companies and hundreds of thousands of employees that provide goods, services, and personnel to the Government.

authorized investigative agency. This amendment is vital as we look to address the backlog that exists in providing government officials and contractors their security clearances.

Amendment 51, Rep. Mitchell (MI): The procurement of commercial items has been bogged down by additional regulations that slow down the acquisition of these products and services. ARWG supports this amendment as it looks to scale back some of these requirements.

Amendment 78, Rep. Panetta (CA): ARWG supports the Congressman's amendment as it seeks to establish a Cyber Institute to better facilitate cooperation between the Department of Defense and industry. Building on existing partnerships with industry will help yield improvements to better cyber cooperation.

Amendment 305, Rep. Connolly (VA): ARWG commends Congress for recognizing and addressing Procurement Acquisition Lead Time's (PALT) immense impact on both government efficiency and effectiveness, as well as contractor costs, and that reducing lead times will help inform ongoing process improvement and efficiencies. This amendment would extend the requirement currently in place at the Department of Defense government-wide. By standardizing the definition of PALT across all federal agencies, and collecting information based on uniform metrics, the government, contractors, and others will be able to more easily analyze this important statistic and use it as a tool to ensure needed services are obtained in a timely manner and unnecessary wait times are reduced.

Amendment 324, Reps. Beyer (VA) and Meadows (NC): Section 813 of the FY17 NDAA codified a 2015 memo from then-Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) Frank Kendall, designed to limit the use of Lowest Price Technically Acceptable (LPTA) as a source-selection method for DOD contracts. At the time, the Department of Defense represented the majority of identified LPTA-related procurements. Since then, growth of LPTA use has been faster within civilian agencies (24% and 55% respectively). Particularly concerning, for IT—a category of services where requirements are harder to define, and innovation is sought—the number of LPTA procurements grew only 19% for DOD and 222% for civilian agencies. This amendment ensures that civilian agencies are also prohibited from using LPTA in this category of contracts and clarifies that contracts should be awarded based on identifying the best value the government will receive.

Amendment 341, Reps. Duncan (TN), Polis (CO), and Jones (NC): As the Department of Defense looks to achieve cost savings, this amendment will provide the Department with data to determine whether incentive programs are working and how they can be scaled to achieve additional savings.

Amendment 405, Reps. Panetta (CA), Jones (NC), Suozzi (NY), Brady (PA), Ruppersberger (MD), Bacon (NE), Schiff (CA), Langevin (RI), McMorris Rogers (WA), and Gallagher (WI): Small and medium sized business often do not have the resources or access to cleared information to adequately secure supply chains. As the Department looks to further secure its supply chain, this

amendment is vital to providing these businesses with the information they need to comply with cybersecurity requirements.

Amendment 531, Chairman Thornberry (TX): The Small Business Innovation Research and Small Business Technology Transfer programs have provided the Department of Defense with many innovative technologies that have been incorporated into the Department and the battlefield. This amendment would allow additional uptake of these technologies and utilize existing research and development.

ARWG opposes the inclusion of the following amendments:

Amendment 23, Rep. Conaway (TX): This amendment, while characterized as a technical correction, would result in an increased burden as audits would result every time there was an update to nearly any DOD business system. Scope and time is unbounded, and it is unclear what would result if the validation is incorrect. Additionally, the amendment does not specify if the financial system contractor would have any recourse if a legacy or upgraded feeder system beyond their control is non-conforming, and what the consequences are for the owner of the business system feeding into the financial system. It would appear the goal might be better achieved by embracing and enforcing FAR, DFARS and auditability conformity as part of future DOD business systems contracts. While ARWG does not support the amendment in its current form, we would like to work with the Congressman to understand the language and determine if there is a way to accomplish his end goal without substantially increasing the audit burden.

Amendment 64, Rep. Gallagher (WI); Amendment 163, Rep. Hunter (CA); Amendment 164, Rep. McCaul (TX); Amendment 345, Rep. Bacon (NE): The amendments listed seek to address concerns with Chinese telecommunication companies, particularly Huawei Technologies Company or ZTE Corporation. While industry supports efforts to protect national security interests, the approach currently in the underlying bill is concerning as it misuses the federal procurement process as a de facto regulation of private sector use of data and communications services, disregards widespread use of Huawei and ZTE by the FVEY countries, and potentially outlaws many US or European equipment suppliers, as well. Furthermore, the "secondary ban" the language creates would disrupt the ability of the Department and its industrial base to effectively communicate in a global fashion for interconnecting or leasing circuits from another provider that uses Huawei or ZTE as a substantial/essential component. Providers that wanted a waiver would have to cut off all access from China, even if they are an American-based global company. While the provision is aimed at certain companies, the language is drafted broadly enough to prevent any entity in China from “accessing” a network, which would mean exchanging data traffic. Finally, industry believes there are existing authorities already available to the government to address the current national security concerns. Industry has been working with the House Armed Services Committee to address these concerns and is swiftly moving towards a consensus recommendation. Ruling these amendments in order would disrupt this process and ultimately limit the capabilities of the Department of Defense and its industrial base to communicate worldwide.

Amendment 73, Reps. Hartzler (MO), Conaway (TX), Gallagher (WI), Ruppersberger (MD), Schiff (CA): The addition of video surveillance to the prohibitions currently provided in Section 880 of the underlying bill as provided in this amendment is problematic as there has been no public review process of the risk these named companies' products present to the government. Security of Internet of Things products is an issue for procurement under the micro-purchase threshold and can be addressed by following the newly revised Risk Management Framework and supply chain processes in the NIST Cybersecurity Framework 1.1. Rather than continuing to place statutory bans on companies based on geographic origin, we urge Congress to use these standards-based methods to prohibit procurement of products that present security risks.

Amendment 226, Rep. Lee (CA): This amendment would arbitrarily cap the reimbursement of compensation of all DoD contractor and subcontractor employees for the fiscal year. Arbitrary compensation reimbursement caps would decrease the ability of federal agencies to access the kind of high-end skills and talent they need to execute their increasingly complex missions. The government already hamstrings its ability to attract top talent by capping civil servant pay at rates far below what is competitive for the skills the government needs. Adding a similarly arbitrary cap to contractors' reimbursements would effectively deny the government access to those critical skills.

Amendment 254, Reps. Schakowsky (IL) and Lee (CA): The amendment does not clearly define the terms "security service or training," and as such it is unclear the scope of the contracts covered under the provision. Additionally, the determination reference in Section 841 of the FY12 NDAA was written to cover those who were "actively supporting an insurgency or otherwise actively opposing United States or coalition forces in a contingency operation in the United States Central Command theater of operations" or "failed to exercise due diligence" to ensure that funds were not transferred directly or indirectly to such individuals in Iraq and Afghanistan. However, the statute does not specifically name the countries it is applicable to outside of the provision's location in Subtitle D--Provisions Relating to Contracts in Support of Contingency Operations in Iraq or Afghanistan. Thus, it is unclear whether the amendment will be applied solely in Iraq and Afghanistan, or if it will extend to other countries, and if so, how the determination will be made as to what is deemed an insurgency or opposition to the United States.

Amendment 309, Rep. Ferguson (GA): The amendment offered by Congressman Ferguson would reduce competition, creating a de facto debarment of suppliers that also operate marketplaces, an increasingly prevalent model in the commercial e-commerce sector. GSA should continue to be afforded access to a variety of models through robust competition as it seeks to implement Section 846 of the FY18 NDAA and, as noted in its initial implementation report for the program, "marketplaces should be open to all suppliers selling to the government." In addition, the amendment adds regulations to the Section 846 program and would require commercial providers to develop government-unique offerings, which is counter to the objective of the program to help federal agencies access innovation by adopting commercial models, terms and conditions as much as possible.

Amendment 362, Rep. Bordallo (GU): Several laws and trade agreements currently dictate when a foreign company can participate in a federal contracting opportunity. A blanket preference for U.S. companies would conflict with these statutes and treaty obligations. Additionally, the amendment does not define "American-owned and -operated companies" and as such it is unclear what would be sufficient for a company to meet such a standard as many companies, even U.S companies, have a global presence.

Amendment 441, Reps. Ellison (MN), Pocan (WI), and Grijalva (AZ): This amendment acts as an automatic, de facto debarment of federal contractors while entirely circumventing long-standing and proven suspension and debarment procedures included in the Federal Acquisition Regulation (FAR), specifically FAR Part 9.4. FAR Part 9.4 provides federal agency suspension and debarment officials with broad authority to undertake suspension and debarment actions to prospectively protect the government's interest and requires that certain processes be followed. Such processes include consideration of the seriousness of the contractor's act or omissions and any remedial measures or mitigating factors undertaken by the company. These factors would be ignored if this amendment were adopted. Under current law, federal agency contracting officers are required to take into account contractor compliance with the Occupational Safety and Health Act before awarding a contract, including suspending or debarring contractors at any time if violations are recurring or severe. Draconian amendments like this would be redundant to the existing process and mandate debarment for contractor with no exception for even minor violations. These amendments would lead to unintended consequences for the federal government, including job loss and disruption of valuable partnerships with leading companies and small businesses that provide critical solutions, goods and services to the Department and the taxpayer.

Amendment 443, Reps. Ellison (MN), Pocan (WI), and Grijalva (AZ): Similar to amendment 441, this amendment acts as an automatic, de facto debarment of federal contractors regarding compliance with a variety of workplace laws and requirements such as the Fair Labor Standards Act before awarding a contract. The amendment ignores consideration of the seriousness of the contractor's act or omissions and any remedial measures or mitigating factors undertaken by the company.

Amendment 532, Rep. Cheney (WY): This amendment would effectively debar companies from contracting with the Department of Defense if they are engaged in a joint venture with certain categories of individuals. The amendment does not consider the type of work the company is engaged in through the joint venture, e.g. if it is for commercial purposes only, or if it is related to classified information or controlled unclassified information, nor does the amendment consider any precautions taken by the company to protect such information. We believe this issue is largely addressed with the Foreign Ownership, Control, or Influence (FOCI) program overseen by the Defense Security Service (DSS). This amendment extends beyond the current threshold for FOCI review where foreign interest "has the power, direct or indirect" to create a de facto debarment of a company where the joint venture partner has "any amount, other than de minimis, of ownership, control or influence." This amendment also seems to contemplate an end-run around the Committee on Foreign Investment in the United States (CFIUS) of sorts,

insofar as it extends current requirements on those handling classified information to make FOCI disclosures and creates a specific requirement to disclose JVs with entities with ties to countries on the "arms controlled" list. Additionally, such JVs would be presumptively prohibited, unless the Secretary makes an exception. With the Department issuing unilateral decisions in this process without regards to the CFIUS process, the possibility exists that the amendment would result in a bifurcated system between the Department and the remaining agencies. Because of the definition of covered programs, any company or individual currently part of the defense industrial base or having a clearance or operating as a cleared defense contractor would be impacted. The definitions also extend the coverage to include anyone with access to CUI. Since CUI covers over 80 categories of information, the potential burden of this provision is substantial

Amendment 533, Rep. Cheney (WY): Currently, only the Departments of State, Commerce, and Treasury have the authority to issue export licenses. While the Department of Defense has a role in the review process in determining whether a license is issued, the Department works in conjunction with these and other agencies. If given the authority to unilaterally compile the list without any context by which technologies are allowed for export, the report required under this amendment could result in a blacklist of products that are exported to China without regard to the precautions taken by the company to protect against national security concerns.

Amendment 539, Rep. Cartwright (PA): The Department of Defense and other agencies have lagged behind in the acquisition of commercial items. This has been due to a number of factors including the burdensome requirements that have been imposed on commercial contracting as well as the difficulty in receiving a commercial item determination from the Department. The changes in the FY18 and FY19 NDAA's are vital in speeding up the acquisition process for these readily available items and ensuring that the government has access to commercial items available that are easily accessible for consumption by the Department.

Additionally, we applaud Congress's bicameral efforts to update the CFIUS review process with the Foreign Investment Risk Review Modernization Act (FIRRMA). Because the Committees of jurisdiction in both Chambers are scheduled to markup their respective bills this week, we oppose efforts to circumvent the legislative process via the NDAA process with Amendment 63.

Finally, we continue to work with Congresswoman Velazquez and Congressman Norman on Amendment 413 to accomplish our shared goal of ensuring effective and continual industry dialogue as Section 846 of the FY18 NDAA is implemented, while avoiding unintended consequences of curbing communication between the General Services Administration and industry.

We look forward to working with the House as the bill advances, and we appreciate your attention to this letter. Should you have any questions or comments please contact Eminence Griffin, at egriffin@itic.org.

Sincerely,

Aerospace Industries Association
The Associated General Contractors of America
American Council of Engineering Companies
Financial Executives International
Information Technology Alliance for the Public Sector
National Defense Industrial Association
Professional Services Council
U.S. Chamber of Commerce